Tan Sri Dato' Seri Halim bin Mohammad v Syed Ahmad bin Tun (Dr) Syed Nasir & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–23–97 OF 2007
ASMABI MOHAMAD JC
20 NOVEMBER 2012

Tort — Defamation — Libel — Plaintiffs claimed defendants had maliciously published contents of unsealed writ and statement of claim (writ and SOC) to newspaper and media — Whether plaintiffs had discharged onus of establishing their pleaded case — Whether defamatory statements in writ and SOC referred to plaintiffs, were defamatory of them and were published to third parties — Defences — Absolute privilege — Whether available — Whether writ and SOC filed in registry was used by defendants in open court hearing — Justification — Whether second defendant could avail herself of defence of justification — Whether defendants were malicious — Damages — Whether award of damages should vindicate gravity of allegations against plaintiffs

Tan Sri Dato' Seri Halim bin Mohammad ('the first plaintiff') was a prominent business and corporate figure in Malaysia, while the first and second defendants were a husband and wife team who had set up Langkawi Aerospace Training Centre Sdn Bhd's ('LATC'), a private flying academy. After negotiations between the first plaintiff and the first defendant, the former had invested in LATC. Consequently 60% of the shares in LATC were transferred to the first plaintiff, while the first defendant, who was to provide the expertise, resources and contacts, held the remaining 40% of the shares. Due to disagreements between the first defendant and the LATC Board of Directors, which included the first plaintiff's son ('the second plaintiff') and daughter ('the third plaintiff'), Othman bin Samat ('the fourth plaintiff') who was also a director of HM Aerospace Sdn Bhd ('the fifth plaintiff'), a company in which the first plaintiff was the executive chairman, the first defendant had initiated legal proceedings against the five plaintiffs. This writ action was subsequently withdrawn. However the plaintiffs claimed that the defendants had through their solicitors caused the contents of the unsealed writ and statement of claim ('the writ and SOC'), which contained defamatory statements about the plaintiffs, to be published in the newspaper, TV3 and Bernama. The plaintiffs claimed that the publication of the alleged defamatory statements concerning them had caused them mental anguish, distress, anxiety and embarrassment. The plaintiffs filed five suits against the defendants claiming for damages and injunctive relief based on the tort of libel, but at the outset of the trial, upon the request of the plaintiffs and for the purposes of an expeditious trial, the five suits were disposed of in one hearing. The first defendant had since passed

away, but the second defendant, his wife, denied the plaintiffs' claims against her. The second defendant claimed that she was a housewife and did not know anything about the writ and SOC. Alternatively the second defendant pleaded the defence of absolute privilege and justification and prayed that the plaintiffs' claims be dismissed with costs.

Held, allowing the plaintiffs' claims with costs to be agreed or taxed:

(1) In order to succeed in a claim on the tort of libel the plaintiffs' had to prove that the alleged defamatory statements made reference to them, that they could bear defamatory imputations and that there was publication of those statements. A perusal of the writ and SOC showed that the five plaintiffs were identified by their respective names. As anybody reading the writ and SOC would have no difficulty in understanding that the contents made reference to the respective plaintiffs, the condition as to reference to plaintiffs had been satisfied. Further, upon perusal of the alleged defamatory statements it was obvious that they were clearly defamatory of the plaintiffs. All the alleged defamatory statements if read separately or together had the meaning and effect of tarnishing the plaintiffs' character, credibility and reputation, both personal and business, and also the offices held by them thereby bringing about hatred, public scandal and contempt. In addition, the defendants had by way of their pleadings admitted the publication of the contents of the writ and SOC. The plaintiffs had therefore satisfied the three ingredients required to prove their case (see paras 65–67).

(2) A fair and contemporaneous report of proceedings publicly heard before any court in Malaysia is absolutely privileged. However, in the present case the writ and SOC filed in the registry by the defendants was not used by the defendants in an open court hearing. That being the case, the publication of the alleged defamatory statements to the media did not attract any privilege. The second defendant's defence of absolute privilege was thus rejected (see paras 85–87).

(3) Except for what was pleaded, the second defendant did not adduce any evidence to prove the truth of the allegations mounted against all the plaintiffs. An evaluation of the second defendant's testimony also showed that she had failed to establish her defence of justification (see para 89).

(4) The second defendant had testified that she had made no attempts to deny the publication of the defamatory statements or deny her involvement in the matter. Even after withdrawing the suit against the plaintiffs, the second defendant had done nothing to inform the public about the withdrawal. From this it was obvious that the defendants were malicious in authorising their solicitors to speak to the media and causing

copies of the writ and SOC to be circulated to the media. In view of these findings, the second defendant was liable to all the plaintiffs for the tort of defamation (see paras 94 & 97).

(5) The allegations against the plaintiffs were highly libelous, in that they imputed to them, inter alia, criminal act, dishonesty, conspiracy, greed and cheating. The evidence showed that the alleged defamatory statements were published to unlimited recipients and widely circulated by the daily newspapers. Any award of damages had to therefore vindicate the gravity of the allegations against the plaintiffs. The first plaintiff was a prominent, successful Malay entrepreneur, who was well-known locally and internationally. Hence the first plaintiff required an appropriate award. Although the rest of the plaintiffs were not as prominent as the first plaintiff, they ought to be adequately compensated for the publication of the alleged defamatory statements. The fact that the second defendant had neither expressed any regret for the publication of the alleged defamatory statements nor apologised for the said publication was also taken into consideration. In the circumstances the first plaintiff was awarded compensatory, aggravated and exemplary damages of RM200,000, while the second to fifth plaintiffs were awarded RM50,000 each (see paras 99–102 & 104).

[Bahasa Malaysia summary

Tan Sri Dato' Seri Halim bin Mohammad ('plaintif pertama') merupakan seorang tokoh perniagaan dan korporat yang terkenal di Malaysia, manakala defendan pertama dan kedua adalah pasangan suami dan isteri yang telah menubuhkan Langkawi Aerospace Training Centre Bhd ('LATC'), sebuah akademi penerbangan swasta. Selepas rundingan-rundingan antara plaintif pertama dan defendan pertama dibuat, plaintif pertama telah melabur dalam LATC. Oleh itu 60% daripada saham-saham dalam LATC telah dipindahkan kepada plaintif pertama, manakala defendan pertama, yang perlu menyediakan kepakaran-kepakaran, sumber-sumber dan kenalan-kenalan, memegang baki 40% saham. Oleh kerana perbezaan pendapat antara defendan pertama dan Lembaga Pengarah LATC, termasuk anak lelaki ('plaintif kedua') dan anak perempuan ('plaintif ketiga') plaintif pertama, Othman bin Samat ('plaintif keempat') yang juga merupakan pengarah HM Aerospace Sdn Bhd ('plaintif kelima'), sebuah syarikat yang mana plaintif pertama merupakan pengerusi eksekutif, defendan pertama telah memulakan prosiding undang-undang terhadap kelima-lima plaintif. Tindakan writ ini kemudiannya ditarik balik. Walau bagaimanapun, plaintif-plaintif mendakwa bahawa defendan melalui peguam mereka telah menyebabkan kandungan writ dan penyataan tuntutan ('writ dan PT') yang tidak dimeterai, yang mana mengandungi kenyataan fitnah mengenai plaintif-plaintif, disiarkan dalam akhbar, TV3 dan Bernama. Plaintif-plaintif mendakwa bahawa penerbitan kenyataan fitnah mengenai mereka telah menyebabkan mereka mengalami

penderitaan mental, tekanan, kebimbangan dan malu. Plaintif-plaintif memfailkan saman terhadap kelima-lima defendan bagi menuntut ganti rugi dan relief injunksi berdasarkan tort fitnah, tetapi pada peringkat awal perbicaraan, atas permohonan plaintif-plaintif dan untuk mempercepatkan perbicaraan, kelima-lima saman telah diketepikan dalam satu perbicaraan. Defendan pertama telah meninggal dunia, tetapi defendan kedua, isterinya, menafikan tuntutan plaintif terhadapnya. Defendan kedua mendakwa bahawa dia adalah seorang suri rumah dan tidak tahu apa-apa mengenai writ dan PT. Selain itu defendan kedua memplidkan pembelaan keistimewaan mutlak dan justifikasi dan permohonan agar tuntutan plaintif ditolak dengan kos.

Diputuskan, membenarkan tuntutan plaintif dengan kos yang dipersetujui atau ditaksirkan:

(1) Untuk berjaya dalam tuntutan tort libel, plaintif-plaintif perlu membuktikan kenyataan fitnah yang didakwa merujuk kepada mereka, bahawa mereka boleh menanggung tempias fitnah dan bahawa terdapat penerbitan kenyataan-kenyataan. Penelitian ke atas writ dan PT menunjukkan bahawa kelima-lima plaintif telah dikenal pasti melalui nama-nama masing-masing. Sesiapa sahaja yang membaca writ dan PT tidak akan menghadapi masalah dalam memahami bahawa kandungan yang dibuat merujuk kepada plaintif-plaintif, syarat rujukan kepada plaintif telah dipenuhi. Di samping itu, penelitian terhadap kenyataan-kenyataan fitnah yang didakwa, adalah jelas bahawa mereka memfitnah plaintif. Kesemua kenyataan fitnah jika dibaca secara berasingan atau bersama-sama mempunyai makna dan kesan mencemarkan watak, kredibiliti dan reputasi plaintif-plaintif, iaitu kedua-dua peribadi dan perniagaan, dan juga syarikat-syarikat yang dipegang oleh mereka dan dengan itu menyebarkan kebencian, skandal awam dan penghinaan. Di samping itu, defendan-defendan telah melalui pliding mereka mengaku telah menerbitkan kandungan writ dan PT. Oleh itu plaintif-plaintif telah memenuhi tiga inti pati yang diperlukan untuk membuktikan kes mereka (lihat perenggan 65–67).

(2) Satu laporan prosiding awam adil dan semasa yang dibicarakan di hadapan mana-mana mahkamah di Malaysia mempunyai keistimewaan mutlak. Walau bagaimanapun, dalam kes ini writ dan PT yang difailkan di pejabat pendaftaran oleh defendan-defendan tidak digunakan oleh defendan-defendan dalam perbicaraan mahkamah terbuka. Lantaran itu, penerbitan kenyataan fitnah kepada media tidak membangkitkan sebarang keistimewaan. Pembelaan defendan kedua iaitu keistimewaan mutlak ditolak (lihat perenggan 85–87).

(3) Kecuali apa yang telah diplidkan, defendan kedua tidak mengemukakan apa-apa keterangan untuk membuktikan kebenaran dakwaan-dakwaan yang dilemparkan terhadap plaintif-plaintif. Penilaian terhadap

keterangan defendan kedua juga menunjukkan bahawa dia gagal untuk membuktikan pembelaan justifikasinya (lihat perenggan 89).

(4) Defendan kedua telah memberikan keterangan bahawa dia tidak cuba menafikan menerbitkan kenyataan fitnah atau menafikan penglibatannya dalam perkara tersebut. Walaupun selepas menarik balik saman terhadap plaintif-plaintif, defendan kedua tidak melakukan apa-apa untuk memaklumkan kepada umum mengenai penarikan balik tersebut. Di sini, adalah jelas bahawa defendan-defendan berniat jahat dalam memberikan kuasa kepada peguam mereka untuk memaklumkan kepada media dan menyebabkan salinan writ dan PT diedarkan kepada media. Bersandarkan dapatan ini, defendan kedua bertanggungan ke atas kesemua plaintif bagi tort fitnah (lihat perenggan 94–97).

(5) Tuduhan-tuduhan terhadap plaintif adalah fitnah keterlaluan, yang mana kesemuanya mengaitkan mereka dengan, antara lain, perbuatan jenayah, tidak jujur, konspirasi, tamak dan penipuan. Keterangan-keterangan menunjukkan bahawa kenyataan-kenyataan fitnah tersebut telah diterbitkan kepada penerima tidak terhad dan diedarkan secara meluas oleh akhbar-akhbar harian. Apa-apa award ganti rugi oleh itu haruslah sewajar dengan keseriusan pertuduhan terhadap plaintif-plaintif. Plaintif pertama adalah tokoh usahawan Melayu berjaya, yang terkenal di dalam dan luar negara. Oleh itu, plaintif pertama memerlukan award yang sewajarnya. Walaupun plaintif-plaintif lain tidak terkenal seperti plaintif pertama, mereka harus diberikan pampasan yang sewajarnya bagi penerbitan kenyataan-kenyataan fitnah tersebut. Fakta bahawa defendan kedua tidak menyatakan sebarang penyesalan mahupun memohon maaf atas penerbitan kenyataan-kenyataan fitnah juga diambil kira. Dalam hal keadaan ini, plaintif pertama diberikan pampasan, ganti rugi tambahan dan teladan berjumlah RM200,000, manakala plaintif kedua hingga kelima diawardkan dengan RM50,000 setiap seorang (lihat perenggan 99–102 & 104).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 484–645.

Cases referred to

AJA Peter v OG Nio & Ors [1980] 1 MLJ 226; [1979] 1 LNS 1 (refd)

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 152; 1 CLJ (Rep) 321, HC (refd)

Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494; [2005] 2 CLJ 569, CA (folld)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)

Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 MLJ 283, HC (refd)
Knupffer v London Express Newspapers Ltd [1944] AC 116, HL (refd)
Lucas & Son (Nelson Mail) Ltd v Obrien [1978] 2 NZLR 289, SC (refd)
Morgan v Odhams Press Ltd [1971] 1 WLR 1239, HL (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)
Smith v Haris [1996] 2 VR 335, SC (refd)
Soh Chun Seng v CTOS-EMR Sdn Bhd [2003] 4 MLJ 180; [2004] 5 CLJ 46, HC (refd)
Stern v Piper [1996] All ER 385, CA (refd)
Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56; [1973] 1 LNS 146 (refd)

Legislation referred to

Defamation Act 1954 [NZ] s 17, First Schedule, cl 2
Defamation Act 1957 ss 11(1), 12(4)

Joseph Yeo (Joseph Yeo & Co) for the plaintiffs.
Vasugi (Venkateswara and Syed Aimi with her) (Syed Alwi, Ng & Co) for the second defendant.

Asmabi Mohamad JC:

BACKGROUND FACTS

[1] There were five suits filed by the respective plaintiffs against the first and the second defendants claiming for damages and injunctive relief based on the tort of libel. These suits were Civil Actions No 23–97 of 2007, 23–115 of 2007, 23–116 of 2007, 22–1404 of 2007 and 22–1405 of 2007. Save for the numbering of the paragraphs in the statements of claim ('SOC'), in essence, all these suits were similar in terms of language and substance.

[2] In the respective writs and statements of claim (SOC) the plaintiffs alleged that on 7 June 2007 at about 3pm, the first and second defendants had through their solicitors, Messrs Azian & Co caused the contents of an unsealed copy of the writ and statement of claim (unsealed writ and SOC) or such part of the same to be published and or made available and or had authorised the said Messrs Azian & Co to publish and or made available the contents of the unsealed writ and SOC to the members of the media, *Berita Harian*, *Harian Metro*, *Utusan Malaysia*, *The Sun*, Bernama, TV3 and other members of the news media respectively.

[3] The plaintiffs contended that the contents of the unsealed writ and the SOC contained serious defamatory allegations about them. The contents of

the unsealed writ and SOC and or part thereof were subsequently published by *Berita Harian*, *Harian Metro*, *Utusan Malaysia* and *The Sun* on 8 June 2007.

[4] According to the plaintiffs the publication of the contents or part thereof of the unsealed writ and SOC had gravely injured their personal and business reputation, goodwill and social standing and had exposed them to public scandal and contempt.

[5] Hence each of the plaintiffs claimed against the first and second defendants for damages, including exemplary and aggravated, injunctive relief, costs and interests.

[6] At the outset of the trial both learned counsel had requested for all these suits to be heard together. Having perused all the pleadings filed herein and for purposes of expeditious trial the court had allowed all the above mentioned civil suits to be heard and disposed of in one hearing.

[7] The case proceeded in that manner with all the plaintiffs in the respective cases and the second defendant having testified. After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by all learned counsel for the respective parties I allowed the plaintiffs' claim against the second defendant and awarded compensatory, aggravated and exemplary damages in the some of RM200,000 to the plaintiff in Civil Action No 23–97 of 2007, and RM50,000 each for the rest of the plaintiffs in Civil Action Nos 23–115 of 2007, 23–116 of 2007, 22–1404 of 2007 and 22–1405 of 2007 respectively. I had also ordered for costs to be agreed between both parties or otherwise to be taxed plus interest.

[8] The second defendant being dissatisfied with the said decisions and having obtained the leave of the Court of Appeal appealed to the Court of Appeal against the whole of the said decisions.

THE PARTIES

[9] The plaintiff in Civil Action No 23–97 of 2007 was Tan Sri Dato' Seri Halim bin Mohammad.

[10] The plaintiff in Civil Action No 23–115 of 2007 was Hisham bin Halim the son of Tan Sri Dato' Seri Halim bin Mohammad.

[11] The plaintiff in Civil Action No 23–116 of 2007 was Marina bt Halim the daughter of Tan Sri Dato' Seri Halim bin Mohammad.

[12] The plaintiff in Civil Action Nos 22–1404 and 1405 of 2007 were Othman bin Samat and HM Aerospace Sdn Bhd respectively.

[13] The first defendant has since passed away and is the late husband of the second defendant. The second defendant is the sole defendant in all these five suits.

[14] I would refer to Civil Action No 23–97 of 2007 as the main suit and the rest of the suits, wherever appropriate, would be referred to and or identified by the respective numbers assigned to the suits. Wherever appropriate I would refer to the plaintiffs in these five suits as the first, second, third, fourth and fifth plaintiffs according to the sequence of the civil action numbers assigned to them.

THE DOCUMENTS

[15] The relevant documents referred to in the course of this trial were documents filed in respect of Civil Action No 23–116 of 2007 which were as follows:

	Documents	Marked
(a)	Pleadings	Document 'A1–A5'
(b)	Common bundle of documents	Document 'B'
(c)	Issues to be tried	Document 'C'
(d)	Statement of agreed facts	Document 'D'

THE UNDISPUTED FACTS

[16] On 7 June 2007 at about 3pm the defendants had through their solicitors Messrs Azian & Co filed the unsealed writs and SOC against the plaintiffs at the Registry of the High Court of Kuala Lumpur citing the plaintiff in the main suit and the rests of the plaintiffs in Civil Action No 23–115 of 2007 (Hisham bin Halim), 23–116 of 2007 (Mariana bt Halim), 22–1404 of 2007 (Othman bin Samad) and 22–1405 of 2007 (HM Aerospace Sdn Bhd) as the second, sixth, third and seventh defendants respectively.

[17] Soon after the said unsealed writ and SOC was filed and before the same was extracted from the Registry of the High Court Kuala Lumpur the first and second defendants had through their solicitors published the contents of the unsealed writs and SOC or so much of the contents of the same and or made available and or caused to be publish and or made available of the same to the news media.

[18] The contents of the unsealed writs and SOC were reported by Bernama at about 4pm on 7 June 2007 and by TV3 on its 8 o'clock Buletin Utama. The contents or such part of the contents of the unsealed writ and SOC were published by *Berita Harian*, *Harian Metro*, *Utusan Malaysia*, and *The Sun* on 8 June 2007 (see pp 44–49 of bundle B).

THE CASE FOR THE PLAINTIFFS

The first plaintiff

[19] The first plaintiff is a prominent business and corporate figure in Malaysia who is a founder-executive chairman and managing director of Halim Mazmin Bhd, an international shipping company listed in the main board of the Bursa Saham Malaysia. The plaintiff is also the executive chairman of HM Aerospace Sdn Bhd which provides aviation training services. The first plaintiff's business as well social standings and credentials are as pleaded in paras 3–8 in the first plaintiff's statement of claim (at pp 15–18 of the bundle A1). None of the first plaintiff's credentials were challenged by the second defendant.

[20] The first plaintiff claimed that on 7 June 2007 at about 3pm the defendants through their solicitors Messrs Azian & Co had caused to be filed a purported claim by way of a writ and statement of claim against the first plaintiff and six others at the Kuala Lumpur High Court Registry (at pp 1–35 of bundle B). After filing the unsealed writ and SOC the defendants' had through their Solicitors Messrs Azian & Co caused to publish and or to make available and or had authorised their solicitors to publish and or make available copies of the unsealed writ and SOC to *Berita Harian*, *Harian Metro*, *Utusan Malaysia*, *The Sun*, Bernama, TV3 and other members of the news media ('alleged defamatory statements'). A copy of the same was as annexed as Appendix 'A' to the first plaintiff's writ and SOC (bundle A1).

[21] The contents of the alleged defamatory statements were reported by BERNAMA at about 4pm or thereabout on 7 June 2007 and were broadcasted by TV3 in its 8pm Buletin Utama news programme and repeated in its Nightline news programme. The contents of the alleged defamatory statements were published by *Berita Harian* (p 47 of bundle 'B'), *Harian Metro* (p 48 of bundle 'B'), *Utusan Malaysia* (p 46 of bundle 'B') and *The Sun* (p 49 of bundle 'B') the next day, 8 June 2007. At the time the alleged defamatory statements were published and or made available to the newsmen the same had not been sealed by the said Registry of the Kuala Lumpur High Court.

[22] The first plaintiff pleaded that the contents of Appendix 'A' annexed to the first plaintiff's writ and SOC contained the alleged defamatory statements

pertaining to the first plaintiff. The contents of the alleged defamatory statements were as contained in Appendix 'A' attached to the first plaintiff's claim. The more relevant portion of the writ and statement of claim which the first plaintiff alleged contained defamatory statements concerning the first plaintiff were as contained in paras 22, 30, 36, 38 and 41 of Appendix 'A'.

[23] According to the first plaintiff in their ordinary and natural meaning the words in these statements meant and or understood to mean that:

(a) the first plaintiff was untrustworthy, dishonest and a cheat;

(b) the first plaintiff plagiarised and or stole the defendants' ideas of an aviation training centre and treated as if it belonged to him;

(c) the first plaintiff was not a person with integrity;

(d) the first plaintiff was a criminal and had falsified several documents in connection with Langkawi Aerospace Training Centre Sdn Bhd's ('LATC') Board of Director's Meetings and its Resolutions;

(e) the first plaintiff was calculative, manipulative, scheming and an insincere person;

(f) the first plaintiff had conspired with his children, the second and third plaintiffs to seize the assets of LATC; and

(g) the first plaintiff was not a person anyone could deal with and or had business with.

[24] The publication of the alleged defamatory statements was with the aim to discredit the first plaintiff personally and business wise and this had caused severe damage to the first plaintiff's personal and business reputation. The alleged defamatory statements had affected the first plaintiff's standing socially. The dissemination the alleged defamatory statements vide the national media had caused irreparable damage to the first plaintiff's reputation and goodwill both locally and internationally and had caused mental distress, anguish and anxiety causing the first plaintiff to suffer irreparable damage and harm (Q&A No 35 of WSPW1).

[25] Hence the first plaintiff claimed against the defendants damages including exemplary and aggravated of not less than 100,000,000, interest, costs and other relief this court deemed fit. The first plaintiff too claimed injunctive relief to restrain the defendants from further publication of the same either through themselves or through their agents.

The second plaintiff

[26] The second plaintiff is the son of the first plaintiff. He is a director of

LATC, HM Aerospace Sdn Bhd and the general manager, Group Operations of Halim Mazmin Bhd an international company listed on the main board of Bursa Malaysia. In essence the second plaintiff's allegations against the defendants were similar to that of the first plaintiff both in terms of substance, manner and mode of publication (see Appendix 'A' of the second plaintiff's writ and statement of claim (bundle A2)). The more relevant portion of the writ and statement of claim which the second plaintiff alleged contained defamatory statements concerning the second plaintiff were as contained in paras 36, 38 and 41 Appendix 'A'.

[27] According to the second plaintiff the contents of the alleged defamatory statements against the second plaintiff meant or understood to mean that:

(a) the second plaintiff was untrustworthy, dishonest and together with the first plaintiff cheated the defendants;

(b) the second plaintiff together with the first plaintiff and the third plaintiff plagiarised and or stole the defendants' ideas of an aviation training centre and treated as if it belonged to them;

(c) the second plaintiff was not a person with integrity;

(d) the second plaintiff after his appointment to the Board of Director's of LATC together with the first and third plaintiffs had committed criminal acts in that they had falsified several documents in connection with Langkawi Aerospace Training Centre Sdn Bhd's ('LATC') Board of Director's Meetings and its Resolutions; and

(e) the second plaintiff had conspired with the first and third plaintiffs to take over LATC and kicked the defendants from LATC.

[28] The effects of the alleged defamatory statements and the relief sought from this court were somewhat similar to that pleaded by the first plaintiff, the particulars of which were as stated in paras 9–13 of the second plaintiffs writ and SOC.

The third plaintiff

[29] The third plaintiff is the daughter of the first plaintiff. She is a director of LATC, HM Aerospace Sdn Bhd and the general manager, Corporate Affairs and Business Development of Halim Mazmin Bhd an international company listed on the main board of Bursa Malaysia. In essence the third plaintiff's allegations against the defendants were similar to that of the first and second plaintiffs both in terms of substance, manner and mode of publication (see Appendix 'A' of the third plaintiff's writ and statement of claim (bundle A3)). The more relevant portion of the writ and statement of claim which the third

plaintiff alleged contained defamatory statements concerning the third plaintiff were as contained in paras 22, 30, 36, 38 and 41 Appendix 'A'.

[30] According to the third plaintiff the contents of the alleged defamatory statements against the third plaintiff meant or understood to mean that:

(a) the third plaintiff was untrustworthy, dishonest and together with the first and second plaintiffs cheated the defendants;

(b) the third plaintiff together with the first and the second plaintiffs plagiarised and or stole the defendants' ideas of an aviation training centre and treated as if it belonged to them;

(c) the third plaintiff was not a person with integrity;

(d) the third plaintiff after her appointment to the Board of Director's of LATC together with the first and second plaintiffs had committed criminal acts in that they had had falsified several documents in connection with Langkawi Aerospace Training Centre Sdn Bhd's ('LATC') Board of Director's Meetings and its Resolutions; and

(e) the third plaintiff had conspired with the first and second plaintiffs to take over LATC and kicked the defendants from LATC.

[31] The effects of the alleged defamatory statements and the relief sought from this court were somewhat similar to that pleaded by the first and second plaintiffs, the particulars of which were as stated in paras 9–13 of the third plaintiff's writ and SOC.

The fourth plaintiff

[32] The fourth plaintiff is a Director of LATC and HM Aerospace Sdn Bhd. The fourth plaintiff is also the assistant general manager, business development of Halim Mazmin Bhd an international company listed on the main board of Bursa Malaysia. In essence the fourth plaintiff's allegations against the defendants were similar to that of the first to third plaintiffs both in terms of substance, manner and mode of publication (see appendix 'A4' of the third plaintiff's writ and statement of claim (bundle A4)). The more relevant portion of the writ and statement of claim which the fourth plaintiff alleged contained defamatory statements concerning the fourth plaintiff were as contained in paras 30, 36, 38 and 41 Appendix 'A'.

[33] According to the fourth plaintiff the contents of the alleged defamatory statements against the fourth plaintiff meant or understood to mean that:

(a) the fourth plaintiff was untrustworthy, dishonest and together with the first to the third plaintiffs cheated the defendants;

(b) the fourth plaintiff together with the first to the third plaintiff plagiarised and or stole the defendants' ideas of an aviation training centre and treated as if it belonged to them;

(c) the fourth plaintiff was not a person with integrity;

(d) the fourth plaintiff after his appointment to the Board of Director's of LATC together with the first to the third plaintiffs had committed criminal acts in that they had falsified several documents in connection with Langkawi Aerospace Training Centre Sdn Bhd's ('LATC') Board of Director's Meetings and its Resolutions; and

(e) the fourth plaintiff had conspired with the first to the third plaintiffs to take over LATC and kicked the defendants from LATC.

[34] The effects of the alleged defamatory statements and the relief sought from this court were somewhat similar to that pleaded by the first to the third plaintiffs, the particulars of which were as stated in paras 9–13 of the fourth plaintiff's writ and SOC.

The fifth plaintiff

[35] The fifth plaintiff is the owner of an aviation training centre which address is at Jalan Kuala Muda, Padang Maksirat 07100 Langkawi, Kedah. The fifth plaintiff provides aviation training services in compliance all relevant laws in connection with the said aviation services.

[36] The fifth plaintiff had commenced its operations around April 2005. It had invested about RM40m for the purpose of its objective to provide the aviation training services. In essence the fifth plaintiff's allegations against the defendants were similar to that of the first to fourth plaintiffs both in terms of substance, manner and mode of publication (see Appendix 'A5' of the fifth plaintiff's writ and statement of claim (bundle A5)). The more relevant portion of the writ and statement of claim which the fifth plaintiff alleged contained defamatory statements concerning the fifth plaintiff were as contained in paras 38 and 41 Appendix 'A'.

[37] According to the fifth plaintiff the contents of the alleged defamatory statements against the fifth plaintiff meant or understood to mean that:

(a) the fifth plaintiff through the first plaintiff stole licenses, course modules and notes from the first defendant and LATC;

(b) the fifth plaintiff through the first plaintiff and LATC stole from the first defendant and LATC the recruitment contract with Malaysian Airline System for the training of its cadet pilots; and

(c) the fifth plaintiff had conspired with the first plaintiff to cheat the defendants.

[38] The effects of the alleged defamatory statements and the relief sought from this court were somewhat similar to that pleaded by the first to the fourth plaintiffs, the particulars of which were as stated in paras 9–14 of the fifth plaintiff's writ and SOC.

CASE FOR THE DEFENCE

[39] In her defence dated 27 November 2007 the second defendant denied the first to fifth plaintiffs' claims against her. Further the second defendant pleaded the defence of absolute privilege and justification and prayed that the plaintiffs' claims be dismissed with costs as there were no merits in each of the plaintiff's case.

[40] The second defendant stated that the first defendant had started a private flying academy known as LATC to train aspiring pilot. The first defendant, now deceased, and the second defendant who were husband and wife had invested about RM200,000 of their life savings to set up LATC. Each of the defendants had 50% shares in LATC. However when the first plaintiff was keen to invest in LATC and after some negotiations between them 60% shares of LATC were transferred to the first plaintiff subject to certain considerations amongst others:

(a) the first plaintiff was to provide and bear all costs of operations and financial support whilst the first defendant was to provide expertise, ideas, resources and contacts in lieu of monetary consideration;

(b) the first defendant's 40% shares in LATC shall not be questioned and shall remain with him;

(c) the first defendant shall not be forced to make financial contribution as the defendants contribution were their initial investments plus other contribution in the form of preparing and designing course modules, efforts in setting up LATC and all the networking;

(d) the first defendant to be appointed as CEO of LATC or alternatively as executive director with monthly salary of RM10,000 with medical benefits and transport allowance;

(e) the first defendant shall also be a mandatory signatory in all bank accounts for the purpose of LATC;

(f) the first plaintiff shall not impede the first defendant's business aspiration or in any way sabotage the operations of LATC; and

(g) the first plaintiff undertook not to transfer the license without the first defendant's permission (Q&A No 4 of WSDW1).

[41] Upon the transfer of the 60% shares in LATC to the first plaintiff none of the conditions mentioned above were fulfilled by the first plaintiff. Instead the first plaintiff appointed the second and fourth plaintiffs as the Board of Directors of LATC. Around the same time the first defendant had also procured an understanding with Malaysia Airlines ('MAS') for MAS to send their trainee pilots to train in LATC. (Q&A No 5 of WSDW1).

[42] As there were disagreements between the first plaintiff and LATC Board of Directors and the first defendant the first defendant initiated the unsealed writ and SOC as the first defendant had wanted things to revert to status quo and to claim for damages. However the suit was subsequently withdrawn. The facts that the second defendant stated in para 40 above were extracted from the defendants' writ and SOC. (Paragraph 15 of Appendix 'A').

[43] The instructing party in the defendants' writ and SOC was the first defendant. However the first defendant had also named the second defendant in the defendants' writ and SOC despite the fact that she was not involved in LATC and or had any dealings with LATC. The second defendants had not instructed anybody to publish the defendants' writ and SOC to anybody.

[44] Besides the defendants' writ and SOC the first defendant had also commenced Suit No D-22–1236 of 2007 in the Commercial Court of Kuala Lumpur against all the plaintiffs in this action and in essence the said suit was aimed at putting back LATC to status quo. The first defendant had also prayed for the return of the license and all materials and contract for the trainee pilots. Suit No D22–1236 of 2007 had been completed and awaiting decision from the said court pending the appointment of an administrator of the first defendant's estate in place of the first defendant.

[45] During cross-examination the second defendant testified that she is a housewife and did know anything about the unsealed writ and SOC. The second defendant further testified that despite the fact that the defendants had withdrawn their suit against all the plaintiffs the second defendant did nothing to inform to the public that the allegations contained in the defendants' writ and SOC had been withdrawn.

THE ALLEGED DEFAMATORY STATEMENTS

[46] The contents of the alleged defamatory statements were as contained in Appendix 'A' attached to each of the plaintiff's claim (see Appendix 'A' annexed to bundle A1–A5). The more relevant contents of the alleged defamatory

statements were as contained in 22, 30, 36, 38 and 41 in the respective pleadings. The contents in paras 22, 30, 36, 38 and 41 of the SOC would be referred to as the 'alleged defamatory statements'.

ISSUES TO BE TRIED

[47] Parties had agreed for the following issues to be tried by this court:

(a) whether the words which were published were defamatory of the plaintiffs;

(b) whether the defence of absolute privilege and justification were available to the second defendant for the publication of the said words of and concerning the plaintiffs; and

(c) whether the words were published by the second defendant with malice.

APPLICABLE LAW ON DEFAMATION

[48] The procedure in establishing a claim on libel has been well illustrated in the leading case of *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ 152; 1 CLJ (Rep) 321) where His Lordship Mohamed Dzaiddin J (as His Lordship then was) said:

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show *(1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published*. Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he had made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged: Rajagopal Rajan. (Emphasis added)

[49] It could be gleaned from the above cited case and numerous other established cases as submitted by both learned counsel, in order to succeed in a claim founded on the tort of libel the following three elements must be proved by the plaintiff:

(a) that the alleged defamatory statements made reference to the plaintiffs; and

(b) that the alleged defamatory statements bear defamatory imputations; and

(c) that there is publication of the alleged defamatory statements to a third party by the second defendant.

[50] In the event a defence of qualified privilege is set up by the defendants, the burden is on the second defendant to prove that she had made the statement honestly, without any indirect or improper motive. If the second defendant succeeded in establishing her defence that the statement was made honestly and without any indirect and or improper motive, the burden would then shifted to the plaintiffs to show express malice. If the plaintiffs succeeded in showing malice then the communication is no longer privileged.

FINDINGS OF THE COURT

Issue (i): Whether the alleged defamatory statements made reference to the plaintiff

[51] It is trite law that an essential element of the cause of action founded on the tort of defamation is that the words complained of should be published of the plaintiff. In a situation where the plaintiff is not named, the test is whether the words would reasonably lead people acquainted with the plaintiff to conclude that he was the person referred to in the alleged defamatory statements (please see *Knupffer v London Express Newspapers Ltd* [1944] AC 116).

[52] David Price and Korieh Duodo, co-authors of the book *Defamation Law, Procedure & Practice* (3rd Ed), state that the test to be applicable is '… whether reasonable readers generally or reasonable reader with the particular knowledge would understand the statement to refer to the claimant. Mere conjecture that it might refer to the claimant is insufficient'.

[53] In *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, Lord Donovan at p 1263 states:

> It is always for the plaintiff to prove that the defamatory words were published of and concerning him. The onus is firmly upon him, and if he does not discharge it, he has no cause of action.

[54] In the case of *Knupffer v London Express Newspapers Ltd* [1944] AC 116 His Lordship Viscount Simon LC emphasised that in handling a cause of action premised on a tort of defamation the following two questions ought to be considered by the court:

(a) firstly, a question of law, that is, could the article complained of having regard to their language, be regarded as capable of referring to the plaintiff?; and

(b) secondly, a question of fact, that is, could the article complained of, in fact, lead reasonable people who are acquainted with the plaintiff to conclude that it does refer to the plaintiff?.

[55] With the above principle in mind, I will now proceed to evaluate the alleged defamatory statements in order to ascertain if the said statements made reference to the plaintiffs.

[56] It is trite that it is not necessary for the plaintiffs to show that the second defendant intended to refer to the plaintiffs. It is sufficient if reasonable people would think that the words contained in the alleged defamatory statements to be defamatory of the plaintiffs. It is also immaterial if the second defendant did not intend to defame the plaintiffs.

[57] A perusal of the unsealed writ and SOC would show that the first, second, third, fourth and fifth plaintiffs respectively were identified by their respective names and cited as the first, second, sixth, third and seventh defendants respectively in the intitulement and references to each of the plaintiff were also made in the relevant paragraphs in the body of the unsealed writ and SOC. Anybody reading the unsealed writ and SOC would have no difficulty in understanding that the relevant contents in the unsealed writ and SOC made reference to the respective plaintiffs. Hence the condition as to reference to the plaintiffs had been satisfied.

[58] In view of the above the two questions posed by His Lordship Viscount Simon LC in the case of *Knupffer v London Express Newspapers Ltd* would have to be answered in the affirmative.

Issue (ii): Whether the alleged defamatory letter was defamatory of the plaintiff

[59] In the case of *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283 the court had stated that whether the words complained of, are defamatory lied on the nature of the statement in that it must have a tendency to affect the reputation of a person.

[60] In the book the *Law of Defamation in Singapore and Malaysia*, (2nd Ed), by Keith R Evans, it is stated that in applying these various tests, the court must look to a particular group that is, in whose eyes must the estimation of the plaintiff be lowered before the words are said to be defamatory. The court went on further to state that in determining the issue the court does not look to the actual effect of the allegations on the person's reputation, or the meaning of the words actually understood or taken by the listeners. It is enough that the listeners actually take the words in a defamatory sense, for they must be reasonably justified in so understanding the words before they are found to be defamatory.

[61] The plaintiffs alleged that the alleged defamatory statements were defamatory of the plaintiffs and had tarnished their character, credibility and

reputation both personal and business, and also the offices held by him thereby bringing about hatred, public scandal and contempt. The plaintiffs claim that the publication of the said defamatory statements concerning them had caused mental anguish, distress, anxiety and embarrassment.

Whether the said words had defamatory imputation and or reflected on the plaintiffs' reputation

[62] It is now opened to this court to analyse the alleged defamatory statements and determine if this statements had defamatory imputation and or reflect on the character, credibility and reputation, of the plaintiffs as pleaded by the plaintiffs in para 9 of the writs and SOC.

What is defamatory imputation?

[63] The following are some of cases which have attempted to define defamatory conduct or imputations:

(a) in *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56; [1973] 1 LNS 146 for instance, Mohamed Azmi J (as he then was) said:

> Thus the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

(b) in the book entitled *Gatley on Libel and Slander* (11th Ed), it was stated that:

> There is no wholly satisfactory definition of defamatory imputation. Any imputation which may tend 'to lower the plaintiff in the estimation 'of any right thinking members of society generally' 'to cut him off from society' or 'to expose him to hatred, contempt to ridicule' is defamatory of him.
>
> An imputation may be defamatory whether or not it is believed by those to whom it is published.
>
> …
>
> A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of a right-thinking person generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only on its tendency.

(c) in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461 His Lordship Gopal Sri Ram said:

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discredible conduct or motives or lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory …

[64] It has to be borne in mind that in arriving at the meaning of the alleged defamatory statements, the whole context of this defamatory statement would have to be examined in order to ascertain whether the words contained in the alleged defamatory statements were defamatory of the plaintiff. In *Soh Chun Seng v CTOS-EMR Sdn Bhd* [2003] 4 MLJ 180; [2004] 5 CLJ 46 His Lordship Ramly Ali J (as His Lordship then was) quoted *Gatley on Libel and Slander* (9th Ed), as reproduced below:

> In *Gatley on Libel and Slander*, (9th Ed), at p 96 the learned author states: It is necessary to take into consideration, not only the actual words used, but the context of the words.
>
> At p 97, the learned author continues:
>
> It follows from the fact that the context and circumstances of the publication must be taken into account and that the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there may be other passages which take away the sting.
>
> Our courts have also pronounced the same principle to be the law applicable in Malaysia. In *Ratus Mesra Sdn Bhd v Shaikh Osman Majid & Others* [1999] 3 MLJ 529; [1999] 8 CLJ 499, Kamalanathan Ratnam J at p 504 stated that:-
>
> I agree that the test to be applied when considering a statement is defamatory of a plaintiff is an objective one that it must be given a meaning in which a reasonable man would understand it. (see *Gatley on Libel & Slander*, (9th Ed), para 3.12) and that for this purpose, that is, in considering whether the words complained of contained any defamatory imputations, it is necessary to consider the whole article.

[65] As had been illustrated by the above mentioned cases and authorities the test to be applied in this scenario is an objective test and to be decided by a judge having considered the entire alleged defamatory statements and the context in which it was made. In order to be defamatory of the plaintiffs the alleged defamatory statements must contain an imputation which tends to lower the plaintiffs in the estimation of right-thinking members of society generally.

[66] Therefore in the case at hand, the test whether the alleged defamatory

statements were in fact defamatory is what meaning or meanings would it convey to an ordinary and reasonable person. It is an objective test on how the words would be understood. The court is only concerned with the natural and ordinary meaning of the words. The plaintiffs had set out the natural and ordinary of the words at para 9 of the SOC. What would an ordinary reasonable person construe the words in the alleged defamatory statements to mean or to convey. Do the words calculate to expose the plaintiff and or bear defamatory imputation to the plaintiff's discredit, 'or which tend to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of a right-thinking person generally' as illustrated by the book *Gatley on Libel and Slander* (11th Ed).

[67] Upon perusal of the alleged defamatory statements it was obvious that the said alleged defamatory statements were clearly defamatory of all the plaintiffs. At para 22 of Appendix 'A' to bundle A1 the defendants stated that the plaintiff's intention to move the administrative office of LATC to the first plaintiff's premises at Wilderness Training Centre was with the aim to isolate and subsequently remove the first defendant from performing his role in the administration and operations of LATC. According to the second defendant this was done in bad faith with the aim to seize control of the operation and business of LATC as well as to seize the first defendant's ideas and efforts in setting up a flying academy.

[68] The statements in para 30 of the alleged defamatory statements contained accusations of falsification of several crucial documents such as the resolutions and minutes of meetings of the Board of Directors of LACT as well as the loan documentation. At para 36 of the writ and SOC the second defendant claimed that the plaintiffs through their actions had demonstrated intention to seize and or had conspired to hijack the first defendant's ideas and the business for their own benefits.

[69] Further at para 38 of the defendants' writ and SOC the defendants alleged that the plaintiffs were greedy and had seized and or hijacked the operations of LATC, caused the transfer of the licence issued to LATC to the fifth plaintiff, hijacked course modules notes, and contract for trainee pilots from MAS to the fifth defendant. Hence depriving the first defendant of his benefits, remunerations as well as profit.

[70] At para 41 of the defendants' writ and SOC, the defendants had stated that the first and second plaintiffs herein had breached their fiduciary duties towards the first defendant. They had conspired to defraud, cheat, and or in

bad faith had caused the first defendant to have suffered damages and losses due to the transfer of LATC's assets, license, contracts and goodwill to the fifth plaintiff.

[71] All the statements if read separately or together had the meaning and effects as stated at para 9 of their respective claims. The words were clear and transparent and did not require any construction. The allegations of falsification of documents would have the impact that the plaintiffs had committed a criminal offence.

[72] Guided by the principle of law which I had discussed above and having evaluated the substance of the alleged defamatory statements which I had stated in the preceding paragraph there is no dispute that the words referred to or were meant to be directed to the plaintiffs. I have no doubt that the alleged defamatory statements made reference to the plaintiffs.

[73] The contents of the alleged defamatory statements bore the meaning in the manner illustrated by the plaintiffs in para 9 of the SOC. My evaluation of the words found in the alleged defamatory statements as mentioned herein clearly showed that they were defamatory of the plaintiffs. These words in their ordinary and natural meaning were defamatory of the plaintiffs. They attacked the moral, character of the plaintiff attributing criminal acts, dishonesty, untrustworthy, greed, and conspiracy and or collusion. The words in the alleged defamatory statements connote the meanings illustrated in para 9 of the SOC. In the alleged defamatory statements the words used to my mind in its ordinary meaning imply to the ordinary reasonable man the meaning as illustrated by the plaintiffs in para 9 of the SOC.

Issue (iii): Whether there is publication

[74] The last ingredient to be satisfied by the plaintiff was whether the defendants had caused the alleged defamatory letter to be published to a third party. In *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173, the then Supreme Court had this to say:

> In order to constitute publication, the defamatory matter must be published to a third party and not simply to the plaintiff. By publication is meant making known of the defamatory matter, after it had been written, to some person other than the person to whom it is written. The uttering of a libel to the party libeled is no publication for the purpose of a civil action.

[75] The plaintiffs had pleaded that the first and second defendant had caused the contents of the unsealed writ and SOC which contained the defamatory statements to be published in the newspaper, TV3 and Bernama.

The defendants had by way of their pleadings admitted the publication of the contents of the unsealed writ and SOC. At para 4 of the defence the defendants pleaded the following:

> Defendan-Defendan menyatakan selanjutnya bahawa pihak media memang berada di Mahkamah apabila writ Saman difailkan dan telah menemuduga peguamcara Defendan-Defendan di mana peguamcara Defendan-Defendan telah menerangkan intipati tindakan tersebut kepada pihak media selepas writ Saman difailkan

[76] There is a clear admission by the defendants in their defence that Messrs Azian & Co who was the solicitors of the defendants had published the contents of the unsealed writ and SOC to the media. Hence causing for the same to be published in *Utusan Malaysia*, *Berita Harian* and *Harian Metro* (pp 46–48 of bundle 'B').

[77] These statements as shown in para 9 of the SOC were capable of the meanings ascribed to them in para 10 of the SOC. Based on the aforesaid I am satisfied that the plaintiffs had on the balance of probabilities proven that the words in the alleged defamatory statements were defamatory of the plaintiffs and that the defendants had published or caused them to be published of the plaintiffs. Hence the plaintiffs had discharged the onus of proving the three ingredients stated by His Lordship Mohamed Dzaiddin J in *Ayob Saud*.

THE SECOND DEFENDANT'S DEFENCE

Absolute privilege

[78] Once the plaintiffs had satisfied the court of the three ingredients as discussed above had been proven the burden then shifted to the second defendant to prove her pleaded defence of absolute privilege and justification. At para 5 of their defence the second defendant had pleaded the defence of 'absolute privilege'.

[79] Section 11(1) of the Act which relate to reports of judicial proceedings states as follows:

> (1) A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and bona fide comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation.

[80] The alleged defamatory statements did not fall under any of the definition of 'A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and bona fide comment' as envisaged by that section.

[81] Section 12(4) of the Act relates to defence of qualified privilege of newspaper and on no way related to the facts before this case where the defamatory material was in the form of an unsealed writ and SOC.

[82] In *Stern v Piper* [1996] All ER 385, the Court of Appeal held that justification was no defence to an action for defamation in relation to the publication of extracts from documents prepared for pending legal proceedings. Privilege only protected reports of legal proceedings in open court. Simon Brown LJ said as follows:

> Absolute privilege attaches, inter alia, to (1) all the various documents, affidavits, statements and the like brought into being for legal proceedings when being used for that purpose; (2) fair accurate reports of proceedings in open court which are (a) contemporaneous, or (b) by newspaper (or possibly TV)
>
> Qualified privilege attaches to such reports of proceedings in open court as (a) contemporaneous, or (b) published by newspaper.
>
> These, in other words, are actionable on proof of malice.
>
> Hirst LJ has already cited the terms in which Holmes J in *Cowley v Pulsifer* [1884] 137 Mass 392 at p 394 to allow privilege to attach to a report of a statement of claim: the filing of such document was not, he held 'a sufficient foundation … for scattering any libel broadcast with impunity'.

[83] In *Smith v Haris* [1996] 2 VR 335, which was a decision of the Supreme Court of Victoria, the Australian perspective was considered. Byrne J held that the common law qualified privilege which relate to reports of proceedings in court is confined to proceedings conducted in open court and does not protect the publication of documents which may or may not be, in any event, have been used in court process. At p 341 His Honour made a distinction between a writ of summons filed in the registry and a hearing in open court which is that the court's proceedings must be opened to the public so that the public has confidence in their integrity. Further His Honour held that a document prepared for, filed and even served is not in the sense part the court's proceedings, at least until it is deployed as part of the judicial process.

[84] In *Lucas & Son (Nelson Mail) Ltd v Obrien* [1978] 2 NZLR 289 at p 289 the New Zealand approached was considered. In that case the newspaper which was the appellant had published an article in its newspaper which in substance

was a repetition of the allegations contained in a statement of claim filed in the Supreme Court registry against the respondent. The Supreme Court had stated that the statement of claim had not been brought up in the proceedings in open court and qualified privilege did not attach to the publication of its contents under either the common law or s 17 and cl 2 of the First Schedule of the New Zealand Defamation Act 1954.

[85] As regards the position in Malaysia, a fair and contemporaneous report of proceedings publicly heard before any court is absolutely privileged.

[86] Hence having regard to the authorities discussed above the provisions relied by the second defendant did not in any way assist the second defendant in her defence as the case at hand did not concern an open court hearing. The publication of the alleged defamatory statements to the media did not attract any privilege. As had been illustrated earlier in the case of *Smith v Haris* the court had drawn the distinction between a writ of summons filed in the registry and a hearing in open court. The said court had also made a distinction between a document prepared for and filed but not deployed as part of the judicial process.

[87] That being the position this court had no choice but reject the second defendant's defence of absolute privilege as there is no privilege attached to the alleged defamatory statements.

Justification

[88] Now I turn to the second defendant's defence of justification. The second defendant alleged that the alleged defamatory statements were in fact true and fair comment. With regards to this defence put forth by the second defendant, as had been illustrated in the case of *S Pakianathan v Jenni Ibrahim* the burden lies on the second defendant to establish justification by proving the defamatory imputation is in fact true.

[89] Except for what was pleaded, the second defendant did not adduce any evidence to prove the truth of the allegations mounted against all the plaintiffs. In short the second defendant did not establish anything beyond what was stated in the unsealed writ and SOC. The second defendant had also admitted in cross-examination that the second defendant had withdrawn the suits against the first to the fifth plaintiffs herein. A notice of discontinuance had been filed (at pp 36–37 of B).

[90] A perusal of the second defendant's evidence-in-chief by way of her

witness statement marked as 'WSDW1' what the second defendant did was to reproduce the contents from the SOC (at p 48 of bundle A1–A5) into her WSDW1.

[91] The second defendant admitted that she had no role to play as the instructing person in the case was in fact the first defendant who had since passed away. The second defendant reiterated that although she was named in the suit she had no part to play after the transfer of her shares to the first plaintiff.

[92] After having evaluated the second defendant's testimony in the court I am satisfied that the second defendant had failed to establish her defence of justification.

WHETHER THERE WAS MALICE

[93] In so far as malice was concerned the plaintiffs had demonstrated that the second defendant made no attempt to deny the publication but had instead admitted in her pleadings the publication of the alleged defamatory statements to third parties. By causing the alleged defamatory statements to be given to third parties especially the newsmen and those not associated with the case was clear evidence that the second defendant was malicious with the aim to tarnish the plaintiffs' reputation to as wide an audience as possible regardless of the truth or otherwise of the allegations.

[94] The second defendant admitted in cross-examination that she had authorised her solicitors Messrs Azian & Co to speak to the media. She also testified that she made no attempts to deny the publication of the defamatory statements and or took steps to deny her involvement in the matter and or that she had anything to do with the case. Even after the notice of discontinuance was filed by her the second defendant did nothing to inform the public about the withdrawal. The media, too were not called to put things back to the proper perspective.

[95] From the above it was obvious that the first and second defendants were malicious in authorising their solicitors Messrs Azian & Co to speak to the media causing copies of the unsealed writs and SOC to be circulated to the media knowing pretty well the media is hungry for sensationalised news. Thus opening the opportunity for the media to cause the contents of the same to be published in *Utusan Malaysia*, *Harian Metro*, *The Sun* and *Berita Harian* respectively. The second defendant ought to have anticipated that the media would gladly grab the unsealed writ and SOC and the next minute the news about the contents of the defamatory statements would be all over the places as was done in this case.

[96] In view of the above findings issue (a) would to be answered in the affirmative, issue (b) in the negative and issue (c) in the affirmative.

[97] Based on the foregoing I am satisfied that the plaintiffs had discharged the onus placed on them by the law to prove their pleaded case, which was on the balance of probabilities. I therefore hold the second defendant liable to all the plaintiffs for the tort of defamation as pleaded.

DAMAGES FOR DEFAMATION

[98] In awarding damages for a claim founded on defamation I am guided by the established authorities enunciated by the higher courts. One of such cases which had been often quoted by the courts across the country was the case of *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; [2005] 2 CLJ 569 where His Lordship Justice Sri Ram JCA had made reference to the book entitled '*Defamation Law, Procedure & Practice*' by Price & Doudu (3rd Ed), at p 208 which had laid down the principles to guide the court in assessing compensatory damages for defamation cases as follows:

(a) the gravity of the allegation;

(b) the size and influence of circulation;

(c) the effect of publication;

(d) the extent and nature of the claimant's reputation;

(e) the behavior of the defendant; and

(f) the behavior of the claimant.

[99] The allegations against the plaintiffs were very serious imputing to them, inter alia, criminal act, dishonesty, conspiracy, greed and cheating. These allegations were highly libelous to the plaintiffs. Any award to be awarded must be sufficient to vindicate the gravity of the allegations against the plaintiffs.

[100] It was shown to this court through the evidence of the plaintiffs the alleged defamatory statements were published to unlimited recipients and widely circulated by the daily newspapers. The news were all over the places by the 8 June 2007.

[101] The first plaintiff is a prominent and well known and successful Malay entrepreneur locally and internationally. The first plaintiff's credentials spoke for themselves and further there was no challenge by the second defendant to his credentials and the many awards and recognition bestowed on him by the rulers of the various states in Malaysia as well as by the Federal Government. Hence this evidence is taken as proven by the first plaintiff. As the first plaintiff

is a prominent and successful business any imputation on the character, reputation and standing would definitely affect him as an entrepreneur in Malaysia or internationally. Hence the first plaintiff deserved an appropriate vindication. The rest of the plaintiffs although not as prominent as the first plaintiff too would be affected by the second defendant's act in publishing the defamatory statements about them and they too ought to be adequately compensated.

[102] The second defendant had never expressed any regret and or remorse on the alleged defamatory statements which had been published. Neither had the second defendant apologised for the said publication.

[103] Perhaps it would be appropriate at this juncture for this court to examine the pattern and or trend of damages awarded by the court in order to ascertain what would be a fair and suitable damages to be awarded to the plaintiffs. In *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; [2005] 2 CLJ 569 for instance where the defamation case involved a Cabinet Minister, the Court of Appeal saw it fit to reduce the award of damages of RM1.5m to only RM200,000. The court ruled that the award of RM1.5m awarded by the High Court was excessive. In *AJA Peter v OG Nio & Ors* [1980] 1 MLJ 226; [1979] 1 LNS 1 which case concerned a claim by an insurance supervisor of an insurance company against another agency supervisor, the award of damages of RM15,000 was reduced to RM9,000.

[104] The amount of damages to be awarded by the court in each case depends on the facts and the circumstances of the case. Looking at the facts of this case, the position of the first plaintiff, and the rest of the plaintiffs and the behaviour of the second defendant, I award compensatory, aggravated and exemplary damages of RM200,000 to the first plaintiff and for the second to the fifth plaintiffs I award the sum of RM50,000 each. I am of the view that the damages awarded by the court is adequate to vindicate the plaintiffs to the public and console them for the wrong done to them by the second defendant.

CONCLUSION

[105] On the totality of the evidence adduced by the plaintiffs through their witnesses both testimonial and documentary and having evaluated the evidence of the second defendant I am satisfied the plaintiffs had discharged the onus of establishing their pleaded case against the second defendant on the balance of probabilities. The words in the alleged defamatory statements referring to the plaintiffs were defamatory of the plaintiffs and these words were published to third parties. Hence the plaintiffs' claim are allowed up to and the extent as mentioned earlier with costs to be agreed otherwise to be taxed. In arriving at the above decision I had carefully considered the evidence adduced

by the plaintiffs and the second defendant both testimonial as well as documentary, the submissions by the plaintiffs as well as the second defendant and the authorities tendered in support of their respective submissions.

Plaintiffs' claims allowed with costs to be agreed or taxed.

Reported by Kohila Nesan